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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Applicant: Fran Gare

Examiner: Leslie A. Wong

Serial No: 09/759,567

Group Art Unit: 1761

Filed: January 11, 2001

Docket: 184-7

For: COMPOSITION CONTAINING XYLITOL AND FIBER

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**APPEAL BRIEF**

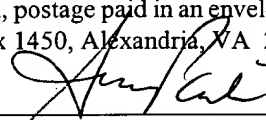
Applicant appeals the status of Claims 41-60 as presented in response to the Final Office Action dated March 10, 2005, pursuant to the Notice of Appeal filed on July 12, 2005 and submits this appeal brief.

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Susan Paik (Reg. No. 46,347)

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    - B1. The Cited U.S. Patent No. 5,711,982 to Takemori et al. Does Not Teach or Suggest a Food Composition for Providing Natural Sweetening, Bulking Properties, Binding, Stabilization, Texture and Support Without Artificial Sweeteners, Gluten and Sugar for Use in a Recipe to Produce a Sugar-Free Food Product, the Food Composition comprising a baked product mix including Xylitol, a whey protein in an amount between about 2 to about 40% by weight, and at least one of a fiber or a stabilizer, as Essentially Recited in Claim 41.

Additionally, the Cited U.S. Patent No. 5,711,982 to Takemori et al. Does Not Teach or Suggest a Dietetic Food Composition Free of Artificial Sweeteners, Gluten and Sugar for

Use in a Recipe to Prepare a Sugar-Free Foodstuff, the Food Composition comprising a baked product mix for baked goods or snack bars including Xylitol, a whey protein in an amount between about 2 to about 40% by weight, a non-toxic soluble or insoluble calcium salt, a low carbohydrate flavoring, and at least one of a bulking agent comprising at least one fiber or a stabilizer comprising at least one gum, as Essentially Recited in Claim 50.

B2. The Cited U.S. Patent No. 5,711,982 to Takemori et al. Does Not Teach or Suggest the Food Composition of claim 44, wherein a weight ratio of the stabilizer to the insoluble fiber and an insoluble non-toxic calcium salt is about 0.1:1.0 to about 1.0:1.0, as Essentially Recited in Claim 45.

Additionally, the Cited U.S. Patent No. 5,711,982 to Takemori et al. Does Not Teach or Suggest the Dietetic Food Composition of claim 51, wherein a weight ratio of the stabilizer to the insoluble fiber and an insoluble non-toxic calcium salt is about 0.1:1.0 to about 1.0:1.0, as Essentially Recited in Claim 53.

B3. The Cited U.S. Patent No. 5,711,982 to Takemori et al. Does Not Teach or Suggest a Sugar-Free Baked Food Product comprising a baked good or snack bar including a sugarless natural sweetening agent having particular functional properties of sugar, said sweetening agent consisting essentially of Xylitol, a whey protein in an amount between about 2 to about 40% by weight, and at least one of a bulking agent to provide water-binding capacity thereby increasing the viscosity of the baked food product

to a desired level and to provide additional bulk without adding caloric value, or a stabilizer to provide a desired amount of elasticity and binding to produce said baked food product without added gluten, as Essentially Recited in Claim 59.

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1. **Real Party in Interest**

The real party in interest is the inventor and Appellant, FRAN GARE.

2. **Related Appeals and Interferences**

None.

3. **Status of Claims**

Claims 1-40 were cancelled without prejudice. Claims 41-60 are pending, stand rejected and are under appeal. A copy of Claims 41-60 is presented in Appendix I.

4. **Status of Amendments**

An Amendment was filed on December 8, 2004 in response to the Office Action of September 9, 2004; this Amendment was subsequently entered and a Final Office Action was mailed on March 10, 2005. An Amendment was filed on May 10, 2005 in response to the Final Action, which has not been entered to date. No Amendments were filed thereafter.

5. **Summary of Claimed Subject Matter**

Claim 41 recites a food composition for providing natural sweetening, bulking properties, binding, stabilization, texture and support without artificial sweeteners, gluten and sugar for use in a recipe to produce a sugar-free food product, the food composition comprising a baked product mix including a sugarless natural sweetening agent having particular functional properties of sugar, said sweetening agent comprising xylitol; a whey protein in an amount between about 2 to about 40% by weight to support a structure of the food product produced using the food composition; and

at least one of a fiber or a stabilizer, said fiber to provide water-binding capacity and to provide additional bulk without adding caloric value. That is, claim 41 is directed to a food composition for providing natural sweetening, bulking properties, binding, stabilization, texture and support without artificial sweeteners, gluten and sugar for use in a recipe to produce a sugar-free food product (Claim 41, preamble). The subject matter of Claim 41 is described in the specification, e.g., at: page 20, line 2 to page 21, line 16.

Claim 45 recites the food composition of claim 44, wherein a weight ratio of the stabilizer to the insoluble fiber and an insoluble non-toxic calcium salt is about 0.1:1.0 to about 1.0:1.0. Claim 53 recites the dietetic food composition of claim 51, wherein a weight ratio of the stabilizer to the insoluble fiber and an insoluble non-toxic calcium salt is about 0.1:1.0 to about 1.0:1.0. The subject matter of claims 45 and 53 is described in the specification, e.g., at page 26, lines 2-9.

Claim 50 recites a dietetic food composition free of artificial sweeteners, gluten and sugar for use in a recipe to prepare a sugar-free foodstuff, the food composition comprising a baked product mix for baked goods or snacks bars including a sugarless natural sweetening agent having particular functional properties of sugar, said sweetening agent comprising xylitol; a whey protein in an amount between about 2 to about 40% by weight to support a structure of the food product produced using the food composition; a non-toxic soluble or insoluble calcium salt; a low carbohydrate flavoring; and at least one of a bulking agent comprising at least one fiber to provide water-binding capacity and to provide additional bulk without adding caloric value, or a stabilizer comprising at least one gum to provide a desired amount of elasticity and binding in the foodstuff. That is, Claim 50 is directed to a dietetic food composition free of artificial sweeteners, gluten and sugar for use in a recipe to prepare a sugar-free foodstuff. (Claim 50, Preamble). The

subject matter of Claim 50 is described in the specification, e.g., at page 20, line 2 to page 21, line 16, and on page 25, lines 2-12.

Claim 59 recites a sugar-free baked food product comprising a baked good or snack bar including a sugarless natural sweetening agent having particular functional properties of sugar, said sweetening agent consisting essentially of xylitol; a whey protein in an amount between about 2 to about 40% by weight to support a structure of the baked food product produced using the food composition; and at least one of a bulking agent to provide water-binding capacity thereby increasing the viscosity of the baked food product to a desired level and to provide additional bulk without adding caloric value, or a stabilizer to provide a desired amount of elasticity and binding to produce said baked food product without adding gluten. That is, Claim 59 is directed to a sugar-free baked food product. (Claim 59, preamble). The subject matter of claim 59 is described in the specification, e.g., at page, line 2 to page 21, line 16.

**6. Grounds of Rejection to be Reviewed on Appeal**

Claims 41-60 stand rejected under 35 U.S.C. §103 as being unpatentable over U.S. Patent No. 5,711,982 to Takemori et al. (hereinafter referred to as “Takemori”), and the rejection is presented for review in this Appeal.

Claims 41, 45, 50, 53 and 59 are each being argued separately in this Appeal.

Regarding the groupings of the Claims, Claims 42-44 and 46-49 stand or fall with Claim 41, claims 51-52 and 54-58 stand or fall with claim 50, and Claim 60 stands or falls with Claim 59.

## **7. Argument**

### **A. Introduction**

The present invention provides a novel solution to the problems of preparing and creating all natural, sugar-free and gluten-free food items, especially baked goods, while maintaining the flavor, texture and 'mouth-feel' of products which contain conventional sugar, flour and fat. Unlike prior art approaches which use artificial reduced calorie sweeteners such as aspartame and acesulfame that simply replace the sweetness component, a food composition according to the present invention provides the overall functional properties of sugar in addition to sweetness (e.g., water activity ( $A_w$ ) reduction, control of starch gelatinization, heat stability, bulking capability and viscosity) while being sugar-free and all-natural.

In addition, a food product or a food composition according to the present invention mimics the texture and feel of a product containing, e.g., flour, while being gluten-free. Thus, overall, the present invention advantageously provides a sugar-free and gluten-free dietetic food which is particularly suitable for e.g., diabetics, celiac disease sufferers (gluten allergy), people on low-carbohydrate or low calorie diets, etc. while being extremely palatable and maintaining desirable qualities of taste and texture found in conventional foodstuff containing sugar and flour.

It is respectfully asserted that Claims 41, 45, 50, 53, and 59 are each patentably distinct and non-obvious over the cited reference in their own right. For example, the below-identified limitations of Claims 41, 45, 50, 53, and 59 are not shown in Takemori. Moreover, these Claims are distinct from each other in that they recite different items. Additionally, note that claim 59 is directed to a baked product as recited in the preamble. Accordingly, each of Claims 41, 45, 50, 53, and 59 represent separate features of the invention that are separately novel and nonobvious



with respect to the prior art and to the other claims. As such, Claims 41, 45, 50, 53, and 59 are separately patentable and are each presented for review in this appeal.

**B. Whether Claims 41-60 are Unpatentable Under 35 U.S.C. §103 Over U.S. Patent No. 5,711,982 to Takemori et al.**

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To establish a *prima facie* case of obviousness, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art and not based on applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ 2d 1438 (Fed. Cir. 1991).

As stated in the MPEP §706.02(j), the initial burden is on the examiner to provide some suggestion of the desirability of doing what the inventor has done and to provide an explanation why one of ordinary skill in the art at the time the invention was made would have been motivated to make the proposed modification. That is, "[T]o support the conclusion that the claimed invention is directed to obvious subject matter, either the references must expressly or impliedly suggest the claimed invention or the examiner must present a convincing line of reasoning as to why the artisan would have found the claimed invention to have been obvious in light of the teachings of the references." *Ex parte Clapp*, 227 USPQ 972, 973 (Bd. Pat. App. & Inter. 1985).

The claims of the present invention include novel features not shown in the cited reference and that have already been pointed out to the Examiner. These features provide significant advantages over the prior art and dispense with or address prior art problems such as the inability to naturally provide functional properties of sugar aside from the sweetness component, as well as the challenge of providing gluten-free foods which nevertheless maintain the taste and texture of foods containing gluten.

It is respectfully asserted that Claims 41, 45, 50, 53 and 59 are each patentably distinct and non-obvious over the cited reference in their own right. For example, the limitations of claims 41, 45, 50, 53 and 59 as identified below are not shown in the cited reference, either alone or in any combination.

**B1. The Cited U.S. Patent No. 5,711,982 to Takemori et al. Does Not Teach or Suggest a Food Composition for Providing Natural Sweetening, Bulking Properties, Binding, Stabilization, Texture and Support Without Artificial Sweeteners, Gluten and Sugar for Use in a Recipe to Produce a Sugar-Free Food Product, the Food Composition comprising a baked product mix including Xylitol, a whey protein in an amount between about 2 to about 40% by weight, and at least one of a fiber or a stabilizer, as Essentially Recited in Claim 41.**

**Additionally, the Cited U.S. Patent No. 5,711,982 to Takemori et al. Does Not Teach or Suggest a Dietetic Food Composition Free of Artificial Sweeteners, Gluten and Sugar for Use in a Recipe to Prepare a Sugar-Free Foodstuff, the Food Composition comprising a baked product mix for baked goods or snack bars including Xylitol, a**

**whey protein in an amount between about 2 to about 40% by weight, a non-toxic soluble or insoluble calcium salt, a low carbohydrate flavoring, and at least one of a bulking agent comprising at least one fiber or a stabilizer comprising at least one gum, as Essentially Recited in Claim 50.**

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“To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art” (MPEP §2143.03, citing *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974)). “If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious” (MPEP §2143.03, citing *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988)).

The Examiner rejected Claims 41-60 as being unpatentable under 35 U.S.C. §103 over Takemori. The Examiner contends that the cited reference discloses a foodstuff containing xylitol, whey protein and a soluble dietary fiber.

It is respectfully asserted that Takemori fails to teach or suggest at least "... a food composition ... without artificial sweeteners, gluten and sugar... comprising: a baked product mix... a sugarless natural sweetening agent... a whey protein in an amount between about 2 to about 40% by weight... and at least one of a fiber or a stabilizer," as recited in claim 41.

Moreover, it is respectfully asserted that Takemori fails to disclose or suggest at least: "... a food composition free of artificial sweeteners, gluten and sugar... comprising: a baked product mix ... including: ... Xylitol; a whey protein in an amount between about 2 to about 40% by weight... a non-toxic soluble or insoluble calcium salt; ... and at least one of a bulking agent comprising at least one fiber or a stabilizer" as recited in claim 50.

Applicant asserts that Takemori not only fails to provide a baked product mix having the elements recited in the claims, but Takemori moreover lacks any suggestion that it should be modified in a manner required to meet the claims. It is respectfully asserted that the Examiner has failed to establish a *prima facie* showing of obviousness and has made no showing as to such suggested modification in Takemori to arrive at the present invention.

The Examiner cites Takemori as allegedly teaching the use of xylitol, whey protein and soluble dietary fiber, and refers to *In re Levin*, 84 USPQ 232, reciting, *inter alia*, "In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function."

Applicant's careful and detailed review of Takemori, however, reveals the following: Takemori teaches a de-lactose milk and process for producing same; the de-lactose milk comprises a fat and a protein which are emulsified. The de-lactose milk/milk powder is intended for use as an ingredient in confectionary foodstuffs, particularly chocolates, candy, ice cream, etc. See e.g., Col. 1, lines 11-20. There is no teaching or suggestion in Takemori of a baked product mix, essentially as claimed in claims 41 and 50. As discussed further below, while some similar ingredients are employed in Takemori, they are not employed in the same way or in the same proportions to provide the result of the present invention.

For example, while Takemori generally discusses the use of xylitol in its disclosure, the context of its discussion regarding this sugar alcohol is wholly different from that of the present invention. In Takemori, such xylitol is disclosed strictly with respect to sugar-free chocolate, the xylitol being an ingredient which is already contained in such chocolate prior to any application of Takemori's invention. See e.g., Col. 3, lines 40-45 and Col. 20, lines 7-15. That is, with respect to

the use of xylitol, Takemori's invention in this instance involves application of its de-lactose milk to sugar-less chocolates which **already** contain xylitol, as it was found "...that the de-lactose milk powder has an effect of improving the disadvantageous tastes of ... xylitol to the chocolate." See e.g., Col. 19, lines 17-24.

Thus, Takemori's inventive composition is simply used to improve the taste of **existing** xylitol in a non-baked confectionary. This is wholly distinguishable from the present invention's actual utilization of xylitol in a novel coactive composition (a baked product mix) with particular ingredients all in specific amounts and ratios, which, as a cooperative whole, imparts the functional properties of sugar in a baked product and in a product for baking purposes and emulates the texture, taste and 'mouth-feel' of conventional products containing sugar, flour and fat while being gluten-free, sugar-free and free of artificial sweeteners.

As essentially presently claimed in claims 41 and 50, sweetening is provided in the present invention without sugar or artificial sweeteners, and binding is provided without the need for gluten to bind and support the finished product. While various stabilizers, fibers and sugar alcohols may have been generally employed in the prior art, the combination and proportions of claims 41 and 50 claims have not been shown and have certainly not produced an all-natural sugar-free and gluten-free product in accordance with that of the present invention.

Further, while Takemori's disclosure does mention whey protein, its discussion of whey protein involves WPC (whey protein concentrate) and the usefulness and useability of Takemori's inventive de-lactose milk/ milk powder hinges on and requires the emulsification of its selected protein (which may comprise WPC in a 'WPC embodiment') with the selected fat to form a stable oil/water emulsion. That is, the resultant product taught by Takemori, for example in the 'WPC' embodiment, does not contain whey protein in independent form, but rather an emulsified whey

protein. Emulsification entails suspension of one liquid in another; thus Takemori's employment of whey protein is clearly distinguishable from and fails to render obvious the food composition and baked food product of the present invention, which utilizes whey protein and results in a final product which does not need emulsification of the whey protein to be rendered useable. Moreover, Takemori fails to make any mention of a whey protein in an amount between about 2 to about 40% by weight, as presently claimed in independent claims 41 and 50.

Also of note, Takemori clearly teaches, claims and requires inclusion of a fat in its inventive composition. In stark contrast, the present invention provides a dietetic product which is not only sugar-free, but gluten-free and fat-free as well, while still having the taste and texture of a conventional product containing fat, sugar and flour. *See e.g.*, specification, page 2, first paragraph. Takemori could never produce a fat-free product. One of Takemori's very basic ingredients is a fat and thus the food composition according to Takemori would actually be adding fat to any recipe it is included in. *See Col. 2, lines 30-42 and Abstract.* That is, unlike Takemori, the present invention provides a product mix without fats. Takemori provides a useful method for reducing lactose from milk, but does so by employing lactose-free milk-fat. One skilled in the art reviewing Takemori would not arrive at the present invention, which is moving away from the use of fat, sugar and gluten in a dessert or food composition.

Overall, as presently claimed in claims 41 and 50, the present invention comprises a formulation which provides a tasty and stable structured product in the form of a baked product mix for emulating foods containing flour and sugar while being both gluten and sugar-free. The prior art has not achieved this, nor is the combination of ingredients disclosed or suggested by the prior art; namely, Takemori fails to disclose or suggest at least a food composition without artificial sweeteners and gluten comprising a baked product mix including a sweetening agent comprising

xylitol, a whey protein in an amount between about 2 to about 40% by weight and at least one of a fiber or a stabilizer, essentially as claimed in claim 41. Takemori further fails to disclose or suggest at least a dietetic food composition free of artificial sweeteners and gluten comprising a baked product mix for baked goods or snack bars including a sweetening agent comprising xylitol, a whey protein in an amount between about 2 to about 40% by weight, a non-toxic soluble or insoluble calcium salt, a low carbohydrate flavoring and at least one of a bulking agent or a stabilizer, essentially as claimed in claim 50.

Even assuming *arguendo*, that all of the ingredients have been taught, the combination of ingredients has not been disclosed in a way that one skilled in the art would be able to arrive at the present invention, as claimed in claims 41 and 50.

Accordingly, it is respectfully asserted that Takemori does not show all of the above-recited limitations of claims 41 and 50 and the Examiner has failed to meet the burden to provide some suggestion of desirability of achieving what the inventor has done in the present invention as claimed in claims 41 and 50.

“If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious” (MPEP §2143.03, citing *In re Fine*, 837 F.2d 1071, 5 USPQ 2d 1596 (Fed. Cir. 1988)). Accordingly, claims 42-49 (which depend from Claim 41 and thus include all the limitations of Claim 41) and claims 51-58 (which depend from claim 50 and thus include all the limitations of claim 50) are patentably distinct and nonobvious over Takemori for at least the reasons set forth above for claims 41 and 50.

**B2. The Cited U.S. Patent No. 5,711,982 to Takemori et al. Does Not Teach or Suggest the Food Composition of claim 44, wherein a weight ratio of the stabilizer**

**to the insoluble fiber and an insoluble non-toxic calcium salt is about 0.1:1.0 to about 1.0:1.0, as Essentially Recited in Claim 45.**

**Additionally, the Cited U.S. Patent No. 5,711,982 to Takemori et al. Does Not Teach or Suggest the Dietetic Food Composition of claim 51, wherein a weight ratio of the stabilizer to the insoluble fiber and an insoluble non-toxic calcium salt is about 0.1:1.0 to about 1.0:1.0, as Essentially Recited in Claim 53.**

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It is respectfully asserted that Takemori fails to disclose or suggest at least "... wherein a weight ratio of the stabilizer to the insoluble fiber and an insoluble non-toxic calcium salt is about 0.1:1.0 to about 1.0:1.0" as recited in claims 45 and 53.

Namely, it is respectfully noted that the ingredients and proportions set forth in the dependent claims have not been disclosed or suggested by Takemori. In particular, Claims 45 and 53 recite, *inter alia*, a food composition wherein a weight ratio of the stabilizer to the insoluble fiber and an insoluble non-toxic calcium salt is about 0.1:1.0 to about 1.0:1.0. Takemori fails to make any mention of desired or optimal weight ratios of a stabilizer to insoluble fiber and insoluble non-toxic calcium salt, much less a weight ratio of stabilizer : insoluble fiber and insoluble non-toxic calcium salt as being about 0.1:1.0 to about 1.0:1.0, as presently claimed. Adhering to this ratio is an important feature of the present invention to ensure a stable suspension of any insoluble dietary fiber and insoluble calcium salts. See e.g., specification, page 26, lines 2-9. Takemori generally mentions use of calcium caseinate in a single embodiment (See Col. 16, lines 21-49); this embodiment also mentions use of an "emulsification stabilizer" in the amount of 0.5 parts and polydextrose in the amount of 5.0 parts. However, Takemori's mere use of these ingredients and



silence with respect to any specific range of desired weight ratios nevertheless fails to disclose or suggest the specific weight ratio of stabilizer : insoluble fiber and insoluble non-toxic calcium salt as being about 0.1:1.0, as essentially claimed in claims 45 and 53.

**B3. The Cited U.S. Patent No. 5,711,982 to Takemori et al. Does Not Teach or Suggest a Sugar-Free Baked Food Product comprising a baked good or snack bar including a sugarless natural sweetening agent having particular functional properties of sugar, said sweetening agent consisting essentially of Xylitol, a whey protein in an amount between about 2 to about 40% by weight, and at least one of a bulking agent to provide water-binding capacity thereby increasing the viscosity of the baked food product to a desired level and to provide additional bulk without adding caloric value, or a stabilizer to provide a desired amount of elasticity and binding to produce said baked food product without added gluten, as Essentially Recited in Claim 59.**

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It is further respectfully asserted that Takemori fails to disclose or suggest at least: "... a sugar-free baked food product comprising: a baked good or snack bar including: a sugarless natural sweetening agent...; a whey protein in an amount between about 2 to about 40% by weight...; and at least one of a bulking agent or a stabilizer" as recited in claim 59.

Firstly, there is no teaching or suggestion in Takemori of a baked food product, essentially as claimed in claim 59. Any reference in Takemori to a 'baked product' is limited to its application to a 'biscuit,' in its Example 12 in Col. 22, lines 24-67. Here, a sugar-less biscuit is prepared with use of the de-lactose milk and de-lactose milk powder according to a proposed recipe, and is baked

at 200 degrees C. This recipe, however, is entirely counter to, fails to address, and indeed teaches away from one of the claimed objectives of the present invention: to provide a gluten-free baked product. As is readily apparent, Takemori's Example 12 includes flour as one of its main required ingredients, and at 100 parts, flour is in fact the largest component of the recipe itself. There is no teaching, suggestion, motivation or concern in Takemori aimed at producing a gluten-free baked product or addressing the needs of a celiac disease sufferer in any capacity.

Moreover, it is respectfully asserted that Takemori fails to disclose or suggest the additional claimed elements of claim 59, namely, a baked good or snack bar including a sugarless natural sweetening agent, said sweetening agent consisting essentially of xylitol; a whey protein in an amount between about 2 to about 40% by weight...; and at least one of a bulking agent or a stabilizer. Arguments directed at Takemori's lack of disclosure of each of these elements have been presented above with respect to claims 41 and 50 under sub-heading B1.

Accordingly, it is respectfully asserted that Takemori does not show all of the above-recited limitations of claim 59 and the Examiner has failed to meet the burden to provide some suggestion of desirability of doing what the inventor has done in the present invention as claimed in claim 59.

"If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious" (MPEP §2143.03, citing *In re Fine*, 837 F.2d 1071, 5 USPQ 2d 1596 (Fed. Cir. 1988)). Accordingly, claim 60 (which depends from Claim 59 and thus includes all the limitations of Claim 59) is patentably distinct and nonobvious over Takemori for at least the reasons set forth above for claim 59.

**B4. Rule 1.132 Declarations and Affidavits Submitted by the Applicant Have Not  
Been Given Full and Proper Consideration by the Examiner**

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It is respectfully asserted that extensive evidence of secondary factors showing unobviousness previously submitted by the Applicant have failed to be given full and fair weight by the Examiner. Namely, informative materials and duly executed Rule 1.132 Affidavits were previously submitted to the Examiner on December 8, 2004 and made of record in the Final Office Action of March 10, 2005. Copies of same are submitted herewith; the Rule 1.132 affidavits have been attested to by the following individuals showing evidence of commercial and long-felt need for products in accordance with the present claims:

- 1) Thomas Thornton, President of Sweetlife, Inc.
- 2) Frank Priedemann, Vice President of Abel & Schafer, Inc.
- 3) Alan Rosen, President of Junior's Cheesecake of Brooklyn
- 4) Dr. Fred Pescatore, MD, Internal Medicine
- 5) Dr. Fran Gare, Shareholder of Sweetlife and Inventor

The combination of elements provided in the present claims provides a product needed in the marketplace and not yet provided in the prior art. While all the present claims are believed to be in condition for allowance for at least the reasons stated, these affidavits of commercial success and long-felt need are asserted as providing "a proper showing that further establishes a coaction or cooperative relationship between the selected ingredients which produces a, new, unexpected and useful function" of the present invention in accordance with *In re Benjamin D. White* 17 C.C.P.A.

(Patents) 956, 39 F. 2d 974. The elements and proportions recited in the claims advantageously provide the binding features of the product to substitute for the gluten in conventional products. The affidavits as well as additional materials demonstrating long-felt need and commercial success are submitted herewith in the Evidence Appendix under Section 9 as Exhibits 1 and A-J.

The Applicant asserts that the commercial success of the product coupled with the long-felt need overcomes the obvious-type rejection.

A copy of a TIME Magazine article of July 19, 2004 (Exhibit 1) shows prevalence of gluten intolerance and that action is needed by lawmakers to provide warnings for products that include gluten. Breads and cereals include gluten and are unavailable for those who suffer from diseases such as Celiac disease. Dessert products cannot be enjoyed by those with gluten intolerance based on the gluten in virtually all conventional dessert products. Many of those with gluten intolerance have a propensity for diabetes (sugar-related disease) as referenced in Exhibit 1. The combination of ingredients in the proportions set forth in the present claims provides a tasty gluten-free and sugar-free alternative, not provided in the prior art.

In addition, while the present invention employs ingredients which may be known, the combination of these ingredients and claimed proportions of same advantageously form a gluten-free and sugar-free baked product having the stability, texture, taste and consistency of a conventional product containing gluten and sugar (see e.g., Exhibit B (Fred Priedemann), paragraphs 5 and 6; Exhibit D; Exhibit E (Al Rosen), paragraph 8; and Exhibit H, paragraph 11) which was and is not readily known to those skilled in the art (see e.g., Exhibit J paragraphs 4-7). The combination and proportion of the ingredients are not a mere optimization as contended by the Examiner, but rather, a new, useful and unobvious result is obtained, which has been desired (see Exhibit 1 (Time Magazine Article), but not provided in the prior art (see Exhibit H).

One new and useful function provided by the present invention is a dessert or food product that has the texture, stability and taste of a product that would otherwise have to include fat, sugar and gluten, **without the fat, sugar and gluten**. This is of enormous benefit to those who suffer gluten intolerance and allergies (*See e.g., Time Magazine Article; Exhibit 1, Exhibit F and Exhibit J*).

Applicant notes that the Examiner had rejected the declarations submitted above in the Office Action of March 10, 2005, stating:

- "1) It is unclear that the product marketed is commensurate in scope with the claimed invention, and
- 2) It is unclear whether the consumer was free to choose on the basis of objective principals. Specifically, the invention was heavily promoted in national best sellers."

*- Page 4, Office Action of March 10, 2005*

However, it is respectfully asserted that with respect to item 1, in the declaration of Thomas Thornton at paragraphs 5 and 6, it is clearly stated that the mixes were blended in accordance with the claims of the present application. This is additionally supported by the statements of Dr. Fran Gare (Exhibit H, paragraph 14). At the time of the signing, the claims were substantially the same as now presented. Therefore, the product mix is commensurate in scope with the claimed invention as attested to by the individuals that are best qualified to state so. The product label (Exhibit A) demonstrates the ingredients list of the product (including Xylitol, whey protein, and fiber) that has experienced the commercial success as described in Thomas Thornton's declaration. The independent Claims 41, 50 and 59, as well as the dependent claims, recite these ingredients.

Therefore, based on the product label and the declarations, which provide statements that the product followed the claims, it is respectfully submitted that the product marketed was and is commensurate in scope with the claimed invention.

Regarding item 2 of the Examiner's statement above, it appears the Examiner alleges that the commercial success of the present invention was due to being 'heavily promoted in national best-sellers.' However, Applicant asserts this is incorrect. There is a statement in Dr. Pescatore's declaration that one of the books he authored was a national bestseller; this best-selling book contained many recipes but few dessert recipes. The product according to the present invention was recommended as a dessert recipe in this book. Upon information and belief, please note that the book was published in the late spring (around June 2004) time frame. However, the data on commercial success was provided for the period beginning in 2002 through May of 2004 ("ending June 1, 2004", *see* Thomas Thornton's declaration, paragraph 12; *also see* paragraph 15 of same).

Dr. Pescatore's book sales did not and indeed, could not promote/be attributed to the commercial success of the present invention, since the book was published too late to affect the data on commercial success provided. The statements made by Dr. Pescatore show that the product mixes of the present invention met his high standards for health and were thus included in his latest book for that reason. The commercial success of the product mixes and the data provided in Mr. Thomas Thornton's declaration was applicable to a time period before Dr. Pescatore's book was even published.

As stated in Thomas Thornton's declaration paragraphs 10, 18, and 19, there was no advertising, and sales of the product were based substantially on word of mouth. It is therefore respectfully submitted that consumers were free to choose this product over the thousands of

products available on the market based on objective criteria and NOT based on high cost widespread advertising or promotion programs.

In summary, the present claims provide a non-obvious combination of ingredients resulting in a product suitable for use particularly with individuals who are gluten-intolerant. The gluten-free product provided according to the present invention is a non-obvious result for which a long-standing need has existed. The product's commercial success provides support of its non-obviousness as does the failed attempts by one skilled in the art to reproduce the mixture (see Exhibit J). The teachings of Takemori would not lead one skilled in the art to produce the present invention. Simply stated, Takemori solves a completely different problem in a completely different way.

It is therefore respectfully submitted that a proper showing has been made of the coaction of the ingredients as producing a new and useful function.

#### **D. Conclusion**

Accordingly, it is respectfully asserted that no such teaching, suggestion, or motivation exists to modify the cited reference, and the cited reference of Takemori does not show all of the above-recited limitations of Claims 41, 45, 50, 53, and 59, and the Examiner has failed to meet the burden to provide some suggestion of the desirability of doing what the inventor has done.

Thus, independent Claims 41, 50 and 59 are patentably distinct and nonobvious over Takemori for at least the reasons set forth above.


"If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious" (MPEP §2143.03, citing *In re Fine*, 837 F.2d 1071, 5 USPQ 2d 1596 (Fed. Cir. 1988)). Claims 42-49 depend from Claim 41 and thus includes all the limitations of

Claim 41; claims 51-58 depend from claim 50 and include all the limitations of claim 50 and claim 60 depends from claim 59 and thus includes all the limitations of claim 59. Accordingly, notwithstanding that claims 45 and 53 are believed to be allowable for the reasons stated above in subheading B2, the dependent claims are believed to be patentably distinct and nonobvious over the cited reference for at least the reasons set forth above for Claims 41, 50 and 59.

At least the above-identified limitations of the pending claims are not disclosed or suggested by the teachings of the applied art reference. Accordingly, it is respectfully requested that the Board reverse the rejection of claims 41-60 under 35 U.S.C. §103. Reconsideration is respectfully requested.

Respectfully submitted,

Date: 8-15-05

  
\_\_\_\_\_  
Susan Paik  
(Reg. No. 46,347)  
Attorney for Applicant(s)

**Correspondence Address:**

**KEUSEY, TUTUNJIAN & BITETTO, P.C.**  
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**8. CLAIMS APPENDIX**

41. (Previously presented) A food composition for providing natural sweetening, bulking properties, binding, stabilization, texture and support without artificial sweeteners, gluten and sugar for use in a recipe to produce a sugar-free food product, the food composition comprising:

a baked product mix including:

a sugarless natural sweetening agent having particular functional properties of sugar, said sweetening agent comprising xylitol;

a whey protein in an amount between about 2 to about 40% by weight to support a structure of the food product produced using the food composition; and

at least one of a fiber or a stabilizer, said fiber to provide water-binding capacity and to provide additional bulk without adding caloric value.

42. (Original) The food composition of claim 41, wherein the fiber comprises a mixture of soluble and insoluble fibers.

43. (Original) The food composition of claim 41, wherein the stabilizer comprises about 0.1 to about 0.5 % by weight of the food composition.

44. (Original) The food composition of claim 42, further comprising at least one of a non-toxic soluble or insoluble calcium salt.

45. (Original) The food composition of claim 44, wherein a weight ratio of the stabilizer to the insoluble fiber and an insoluble non-toxic calcium salt is about 0.1:1.0 to about 1.0:1.0.

46. (Previously Presented) The food composition of claim 41, wherein particular functional properties comprise water activity reduction, control of starch gelatinization, heat stability, bulking capability and viscosity.

47. (Previously presented) The food composition of claim 41, wherein the food product is included in at least one of a dairy product, a snack bar, a salad dressing, a candy, a topping and a beverage.

48. (Original) The food composition of claim 41, wherein the food product containing the food composition provides a therapeutic effect for a diabetic user.

49. (Original) The food composition of claim 41, wherein said xylitol is provided in amounts able to sweeten the composition to a desired level and provide bulking capability, said bulking agent is provided in amounts able to provide water-binding capacity thereby increasing the viscosity of the preparation to a desired level and providing additional bulk without adding caloric value, and said stabilizer is provided in amounts able to provide a desired amount of elasticity and binding to foodstuffs produced using said composition.

50. (Previously presented) A dietetic food composition free of artificial sweeteners, gluten and sugar for use in a recipe to prepare a sugar-free foodstuff, the food composition comprising:

a baked product mix for baked goods or snacks bars including:

a sugarless natural sweetening agent having particular functional properties of sugar, said sweetening agent comprising xylitol;

a whey protein in an amount between about 2 to about 40% by weight to support a structure of the food product produced using the food composition;

a non-toxic soluble or insoluble calcium salt;

a low carbohydrate flavoring; and

at least one of a bulking agent comprising at least one fiber to provide water-binding capacity and to provide additional bulk without adding caloric value, or a stabilizer comprising at least one gum to provide a desired amount of elasticity and binding in the foodstuff.

51. (Original) The dietetic food composition of claim 50, wherein said bulking agent comprises a mixture of soluble and insoluble fibers.

52. (Original) The dietetic food composition of claim 50, wherein the stabilizer comprises about 0.1 to about 0.5 % by weight of said food composition.

53. (Original) The dietetic food composition of claim 51, wherein a weight ratio of the stabilizer to the insoluble fiber and an insoluble non-toxic calcium salt is about 0.1:1.0 to about 1.0:1.0.

54. (Previously Presented) The dietetic food composition of claim 50, wherein particular functional properties comprise water activity reduction, control of starch gelatinization, heat stability, bulking capability and viscosity.

55. (Original) The dietetic food composition of claim 50, wherein the low carbohydrate flavoring comprises at least one of a cocoa powder, all nuts, all green vegetables and legumes, chocolate, vanilla, coffee, mocha, carrots, tomatoes, fruits, herbs and any combination thereof.

56. (Original) The dietetic food composition of claim 50, wherein the food product containing the food composition provides a therapeutic effect for a diabetic user.

57. (Previously presented) The dietetic food composition of claim 50, wherein the food product comprises at least one of a dairy product, a snack bar, a salad dressing, a candy, a topping and a beverage.

58. (Original) The dietetic food composition of claim 50, wherein the low carbohydrate flavoring comprises about 10%-60% by weight of said food composition.

59. (Previously Presented) A sugar-free baked food product comprising:

- a baked good or snack bar including:

- a sugarless natural sweetening agent having particular functional properties of sugar, said sweetening agent consisting essentially of xylitol;

- a whey protein in an amount between about 2 to about 40% by weight to support a structure of the baked food product produced using the food composition; and

- at least one of a bulking agent to provide water-binding capacity thereby increasing the viscosity of the baked food product to a desired level and to provide additional bulk without adding

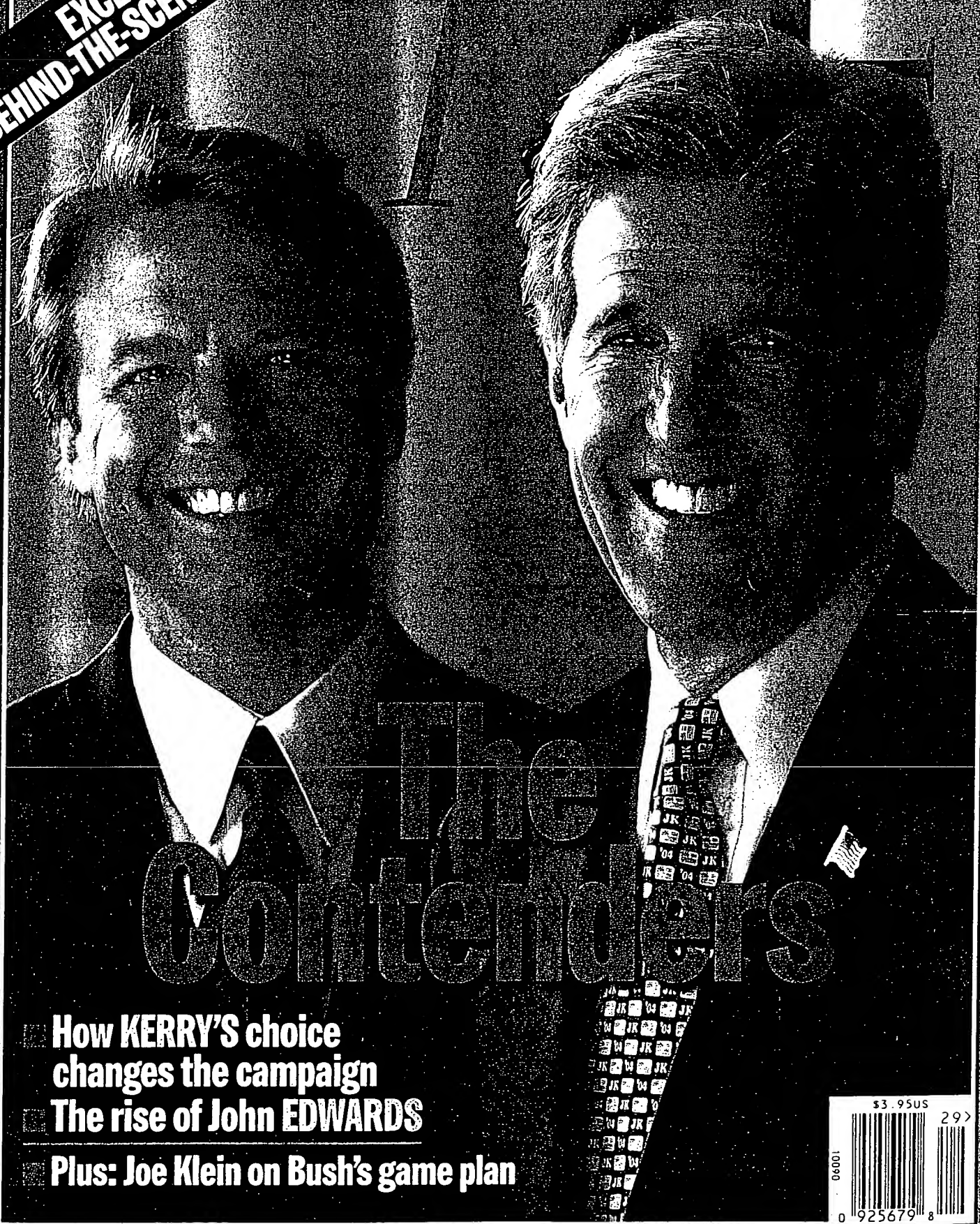
caloric value, or a stabilizer to provide a desired amount of elasticity and binding to produce said baked food product without adding gluten.

60. (Original) The sugar-free baked food product of claim 59, wherein a texture of the baked food product is maintained to resemble a sugar-containing baked food product.

9. **RELATED EVIDENCE APPENDIX**

The attached Evidence (Exhibit 1 and Exhibits A-J) was submitted by the Applicant on December 8, 2004 and subsequently entered in the record by the Examiner. The Evidence was acknowledged by the Examiner in the Office Action mailed March 10, 2005.

**EXCLUSIVE  
BEHIND-THE-SCENES PHOTOS**



# The Contenders

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- **The rise of John EDWARDS**
- **Plus: Joe Klein on Bush's game plan**

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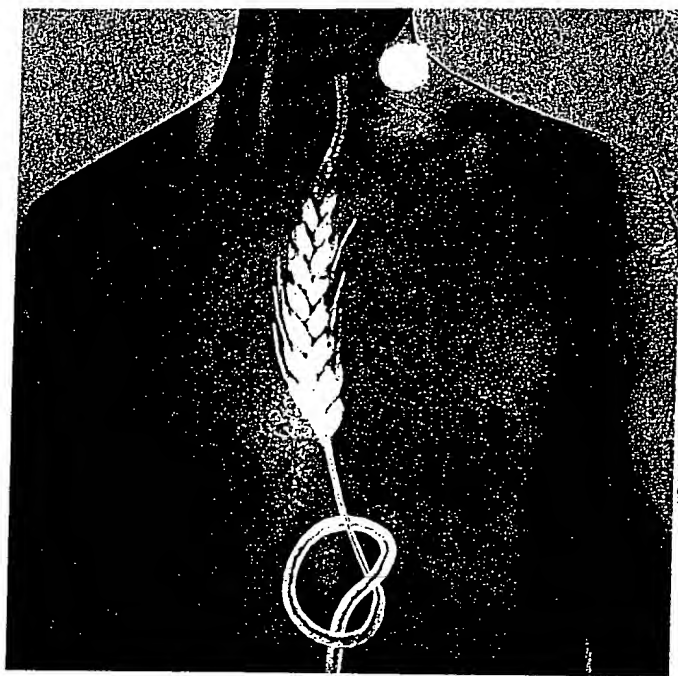


ILLUSTRATION FOR TIME BY BRIAN STAUFFER

## Allergic to Wheat?

Millions are without knowing it—but a simple test can help you find out

By MICHAEL D. LEMONICK

**I**F YOU COME DOWN WITH celiac disease this week, you might not know it until 2015. It's not that the illness is symptom free. Caused by a severe allergy to gluten (a protein found in wheat and other grains), the disease can cause diarrhea, gas, cramping and weight loss—which is why doctors often mistakenly assume it's irritable bowel syndrome. Or it might show up instead as joint pain, or fatigue, or a skin rash.

No wonder celiac disease is known as the great pretender, and why it takes an average of

11 years to diagnose. An expert panel convened by the National Institutes of Health last month estimated that some 3 million Americans may suffer from the illness—10 times as many as doctors once thought. The disease is not just discomfiting; gluten from wheat, rye, barley and several other grains triggers an immune response that attacks the lining of the intestines, cutting down on the absorption of calcium, iron and other nutrients.

Over time, says Dr. David Elliott, director of the Celiac Clinic at the University of Iowa medical center, celiac disease can lead to osteoporosis, anemia and severe weight loss.

There is also an increased risk of diabetes, thyroid disease, liver disease and arthritis. Fortunately, celiac disease has become a lot easier to diagnose in the past few years, thanks to more reliable blood tests. If the results are positive, a quick biopsy of the small bowel provides a definitive verdict. The trick now, say experts, is to teach primary-care doctors to recognize the symptoms and test for the disease.

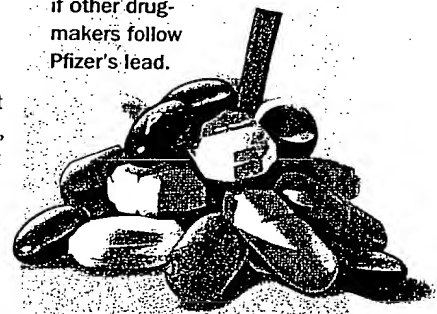
Unfortunately, there's no cure for celiac disease, which seems to be caused by a genetic defect. But there is a remedy that's 100% effective: stay away from gluten. That isn't as easy as it sounds. Breads and cereals are obvious sources of the offending protein, but it's also used—and not always labeled—as an additive in cold cuts, soups, soy sauce, malt vinegar and even jelly beans.

Finding hidden ingredients could get easier if Congress passes the new labeling bill that's scheduled to come to a vote this week. The law would require manufacturers to identify wheat and other troublesome grains on product labels. And although it wouldn't require a label for gluten per se, it does instruct the Department of Health and Human Services to define what it means by "gluten free." Meanwhile, says Elliott, if you have received a diagnosis of celiac disease, you should consult a professional dietitian about how to rid your diet of gluten.

## PHARMA CHARM

Recent public-opinion surveys put the pharmaceutical industry in the unpleasant company of cigarette makers and oil giants, which may help explain why U.S. drug companies have been so eager to polish their image. Pfizer, maker of such blockbusters as Lipitor, Viagra and Zolof, announced last week that it will provide discounted drugs to uninsured Americans, regardless of age or income. Average savings for families making less than \$45,000 could be nearly 40%. Pfizer is also expanding a program that provides free medicine to families making less than \$31,000. With politicians under pressure to lift rules preventing Americans from importing cheaper drugs, don't be surprised if other drug-makers follow Pfizer's lead.

TAKE ONE



## PSA REVISITED

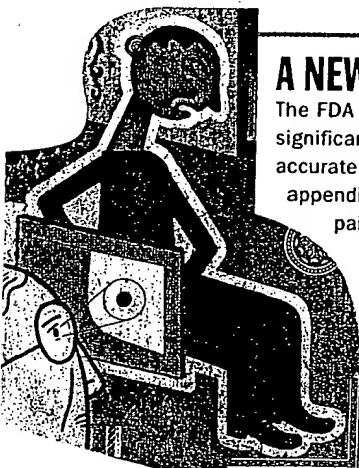
The link between PSA blood-test results and prostate cancer has seen its share of controversy; one recent study found that some men developed the cancer even when their PSA readings were normal. A new study suggests that it is the rate of increase in a man's PSA level, not the level itself, that determines the risk of death from the disease. The study found that among 1,100 men with prostate cancer, those whose PSA levels rose more than 2 points in the year before diagnosis were nearly 10 times as likely to die.

## A NEW WINDOW ON THE APPENDIX

The FDA has approved NeutroSpec, a technique that could make it significantly easier to diagnose appendicitis. That's good news because accurate diagnosis is a problem. Half the 700,000 cases of suspected appendicitis in the U.S. each year lack the usual symptoms of fever and pain in the lower right abdomen, and 15% to 40% of all appendectomies prove unnecessary because the appendix turns out to be normal. The new technique uses a radioactive tracer that binds to an infection-fighting white blood cell. Doctors locate the tracer using an imaging device called a gamma camera. In trials, the technique diagnosed nearly 100% of appendicitis cases within an hour. The tool may also be able to pinpoint hard-to-locate infections in other tissues.

—By David Bjorklie

ILLUSTRATION FOR TIME BY RICARDO STAMPATORI





**RULE 1.132 DECLARATION OF Thomas Thornton**

**REGARDING COMMERCIAL SUCCESS**

I, Thomas Thornton, declare as follows:

1. I am the President of Sweetlife, Inc. (hereinafter Sweetlife), a Florida based corporation located at 1111 Brickell Avenue 11<sup>th</sup> Floor, Miami Florida 33131.

2. I have been employed as the president of Sweetlife since 2003. I have had a long and successful career in the Food Industry and have built two successful multi-million dollar specialty gourmet stores, Dean and Deluca in New York and Carmine's in North Palm Beach Florida. I have over 15 years in the food industry and I am very familiar with currently available products from a wide variety of low carb and sugar free manufacturers.

3. As a business owner in the food industry, I am familiar with the effort and amount of work needed to build a business in this industry. I have knowledge of the baking industry and am familiar with diet products currently on the market.

4. Sweetlife™ is the distributor of several product mixes which are referred to as Fran Gare's Decadent Desserts® and Fran Gare's Miracle Sweet®. Several flavors exist including cheesecake mix, almond mix and chocolate brownie and cookie mix. These will be referred to hereinafter as "mixes". Sweetlife was formed to develop and distribute the mixes.

4. Fran Gare is the sole inventor of application serial no. 09/759,567. Fran Gare has assigned her rights to Sweetlife in an assignment recorded at Reel No. 011539, frame 0512.

5. The mixes are blended in accordance with the claims of patent application, Serial No. 09/759,567.

6. All of the products as referenced above have an ingredients list clearly visible on the label. Xylitol, whey protein and fiber (psyllium) are all listed and clearly visible. Exhibit A is a label portion used to identify one of the mixes showing the ingredients listing. These ingredients

follow the elements and proportions presently recited in the claims of the above-references patent application.

7. The success of the mixes is due to its ingredients list including Xylitol and a gluten-free (flourless) mixture. The combination of ingredients coact to bring about a superior finished product. The finished product is a baked product or food having all of the features of the present claims and provides a taste of a flour and sugar containing dessert without flour, gluten or sugar.

8. Frank Priedemann, vice president of Abel & Schafer, Inc., a bake mix blending firm stated that the mixes of Sweetlife are unique in their ingredient combinations, beautiful looking and delicious tasting. Mr. Priedemann was so impressed with the mixes he has included them in a line of products that he sells to his own customers. (See Exhibit B)

9. The baked products and mixes are distinguished from other available products currently on the market. The superior quality of the finished product as a result of the blending and proportions set forth in the claims is the reason for the success of the product. It is my belief that without the appropriate proportions of the listed ingredients, the finished product would not provide the superior texture and flavor that has been achieved by the mixes.

10. Because the mixes do not provide the finished product (Sweetlife™ provides the mix) to the end-user and inform them directly about the superior quality of the product and since Sweetlife™ has not advertised or budgeted money for advertising the mixes, the mixes have been sold through word of mouth and presenting the product at food shows.

11. The mixes are very successful. Sweetlife™ currently takes direct orders at shows and by telephone and email. As the word of mouth has spread, Sweetlife™ has continued to get more and more high caliber clients. The client list over the past year has become quite impressive. The client list includes, for example, Junior's of Brooklyn™, H-P Distributors™, and Starwood™, which is a company that owns many hotel chains and spas worldwide including, e.g., Westin™. The list of retailers wanting to carry the mixes has dramatically increased from the time the product was first introduced. Exhibit D is a letter from HP Distributors.

12. Sweetlife™ began operations in 2000, but began selling the mixes in the broader market

in 2002 when the company was able to organize its operations. Between January 1, 2002 and December 31, 2002, Sweetlife sold over \$112,000 (one hundred and twelve thousand dollars) in mixes in the United States. By year-end 2003 the total revenue, was over \$490,000 for the mixes within the United States. The mixes had net sales of \$276,082 for the five months ending June 1, 2004 and would be higher but for the lack of inventory due to an alarmingly high number of orders.

13. Net sales for 2002 were \$112,429 and for 2003 were \$490,936. This represents an increase of over 336%. This result is much greater than the normal expected sales for new products, which is typically a loss or low double-digit growth percentages, especially for brand new products.

14. Actual net sales derived from the mixes exceeded expected sales by about 200%.

15. Bulk weight of mixes sold for each of 2002, 2003 and 2004 (first half) shows an exponential growth in the volume of sales. In 2002, 2,625 pounds of the mixes were sold. In 2003, 26,559 pounds of the mixes were sold. In the first half of 2004, 52,650 pounds of the mixes were sold.

16. My experience with successful new products has shown that an expected yearly growth rate is between 15-25 %; instead, Sweetlife™ has experienced a growth rate of over 300% and it appears that a triple digit rate will be maintained or increased in the next year.

17. Advertising for mixes since their release included only booths at tradeshow and word of mouth. No formal public relations effort, nor television or radio or newsprint ads were run for the mixes. Advertising budgets for other competing products or mixes are typically orders of magnitude greater than the amount spent (cost of booths and website maintenance) by Sweetlife™ in promoting their mixes.

18. Sweetlife has continued to sell the mixes with similar success to present, despite the lack of advertising.

19. As a result of word of mouth, blenders and bakers got word of the surprising results

obtained by the mixes. Al Rosen, a lifelong baker and owner of Junior's of Brooklyn, which is world renowned for its cheesecakes, tried one of the mixes in his cheesecakes and was astounded by the results. (see Exhibit E). Mr. Rosen was so impressed with the mix and the combination of ingredients; he selected the mix of Sweetlife™ to incorporate into his products, and immediately inquired into becoming a stockholder in the company.

20. The mixes have been extremely successful and once introduced have become an instant favorite with consumers who have been able to incorporate the mixes its desserts. Sweetlife™ is constantly getting praised for the innovative combination of ingredients, which result in a texture and taste on par or better than desserts containing flour and sugar. In fact, consumers often do not recognize the finished product of the mixes as a sugar-free, gluten-free dessert.

21. Reaction from customers—both distributor customers and the end consumers— has been outstanding. Sweetlife™ consistently hears from these customers and distributors that the mixes fill a long felt need for a sugarless and gluten-free product with the texture and taste of desserts containing flour and sugar. The mixes provide diabetics and sufferers of other food allergies and intolerances with a delicious tasting, healthy dessert. See, e.g., Exhibit F for email of Vance Pasqua.

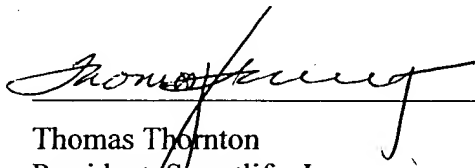
22. Medical professionals recommend the mixes to their clients and patients as well. One notable case is that of Dr. Fred Pescatore, MD MPH, author of The Hamptons Diet. Dr. Pescatore provided a healthy diet book with few desserts, but listed a Sweetlife™ mix in his book. Dr. Pescatore stated that in addition to the sugar-free, grain and gluten-free aspects of the unique mix, the taste of the product distinguished it from any other product on the market. (see Exhibit G).

23. The mixes provide a baked product that does not suffer from too much water as some of the water is absorbed by the Xylitol, the whey protein provides the cohesiveness to create a matrix with the fiber to simulate the texture of flour and sugar baked goods. The presently claimed combination of materials is not obvious to those skilled in that art that have desired to make a sugar-free, gluten-free product. The blending and combination of ingredients have been developed as a result of careful processing by the inventor, Dr. Fran Gare, MD. (see Exhibit H)

24. Reverse engineering the combination and proportion of the ingredients has been attempted by many bakers and blenders alike but without success. The failure of others to copy Sweetlife's mixes has contributed to the success of the products. These proportions and combinations of elements are presented in the claims of the present patent application.

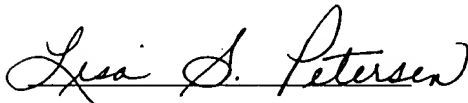
25. After tasting the mixes, many skeptics have come to appreciate the difficulties of achieving the proportion and combination of ingredients, which provide the success for Sweetlife's mixes. (See, e.g, Exhibits I and J).

I declare that the statements made herein of my own knowledge are true, and that all statements made on information and belief are believed to be true, and further that these statements are made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 8 of the United States Code; and that such willful statements may jeopardize the validity of the application or any patent issuing thereon.

  
Thomas Thornton  
President, Sweetlife, Inc.

Date: July 15, 2004

Sworn before me this date 7/15/04

  
Notary Signature





A PRODUCT OF  
THE SWEET LIFE, INC.  
MIAMI, FLORIDA  
U.S.A.  
305-682-8392  
PATENT PENDING

Add to Atkins, Bust The Sugar, Zap the Zone,  
Promote Protein Power, Somersize and Sugar-free diets.



8 3 1290 00123 7

## Nutrition Facts

Serving Size 19g (mix in 1 brownie)  
Servings per Container 9

### Amount per Serving

Calories 50 Calories from Fat 5

% Daily Value\*

Total Fat	.5 g	1%
Saturated Fat	0 g	0%
Cholesterol	0 mg	0%
Sodium	50 mg	2%
Total Carbohydrate*	14 g	5%
Dietary Fiber	2 g	7%
Sugars	0 g	
Sugar Alcohols	11 g	
Protein	3 g	

Vitamin A 0% • Vitamin C 0%

Calcium 2% • Iron 0%

\*Percent Daily Values are based on a 2,000 calorie diet.  
Your daily values may be higher or lower depending on  
your calorie needs.

	Calories	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

Calories per gram

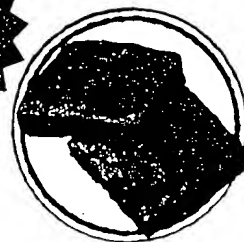
Fat 9 • Carbohydrate 4 • Protein 4

\*To find Net Carbs, subtract the sugar alcohols  
and the fiber from the total carbohydrates.

INGREDIENTS: Xylitol, Cocoa Powder (Processed With Alkali)  
Whey Protein Isolate, Psyllium Husks, Calcium Caseinate,  
Sodium Caseinate, Xanthan Gum, Salt

①D NON-GMO

FRAN GARE'S  
**DECADENT  
DESSERTS™**



# CHOCOLATE BROWNIE & COOKIE MIX

SWEETENED WITH

*All-Natural Xylitol*

**SUGAR-FREE • LOW CARBOHYDRATE**

**ALL NATURAL • GLUTEN FREE**

IDEAL FOR SUGAR-FREE/FLOUR-FREE/LOW-CARBON DIETS

\*SEE SIDE PANEL FOR NUTRITION INFORMATION

Net Wt 6 oz (170 g)



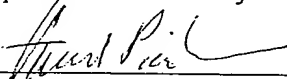
## ABEL & SCHAFER, INC.

### RULE 1.132 DECLARATION OF Frank Priedemann REGARDING COMMERCIAL SUCCESS

I, Frank Priedemann, declare as follows:

1. I am the Vice President of Abel & Schafer, Inc., (hereinafter Abel), a New York based corporation located at 20 Alexander Ct. Ronkonkoma, NY 11779
2. I have been the vice president of Abel since 1986, and have been in the blending industry for 21 years.
3. Abel is a renowned blender and has many recognizable clients that require our blending services for blending food mixes.
4. Abel has been blending Fran Gare's Decadent Desserts® mixes for The Sweet Life, Inc. Several flavors exist including New York Cheesecake Mix, Chocolate Cheesecake Mix, Almond Mix and Chocolate Mix and Cinnamon Pecan Mix. These will be referred to hereinafter as "mixes".
5. The mixes are an all-natural blend of xylitol, whey protein and fiber, such as, psyllium, crushed nuts or cocoa powder and some have xanthan gum and organic flavors. We have baked these products in our test kitchen and find that although they do not contain sugars or grains (as traditional desserts do) they look and taste as traditional desserts look and taste.
6. I do not have knowledge of any other product mix, which includes Sweet Life's unique ingredient combinations. While other products mixes on the market have sugar-free and grain-free claims, the other product mixes do not provide the texture, appearance and taste that the unique mixes of Sweet Life provide.
7. I have been so impressed with the product mixes due to the ingredient combination, the health benefits and the look and taste of the finished product that I have included Sweet Life mixes in a line of product mixes that I sell to bakeries, hotels, cruise lines, restaurants and spas.

I declare that the statements made herein of my own knowledge are true, and that all statements made on information and belief are believed to be true, and further that these statements are made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 8 of the United States Code; and that such willful statements may jeopardize the validity of the application or any patent issuing thereon.

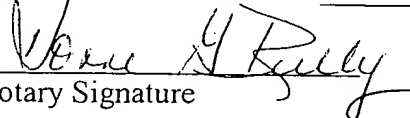


Frank Priedemann

Vice President, Abel & Schafer, Inc.

Date: 9/21/04

Sworn before me this date 21ST SEPT 2004

  
Notary Signature

DONNA G. REILLY  
NOTARY PUBLIC, State of New York  
No. 52-4634159  
Qualified in Suffolk County  
Commission Expires

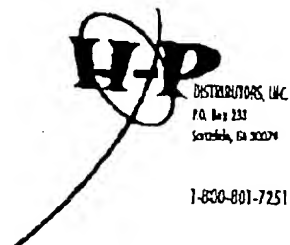
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PAGE 01



June 3, 2004

Reesa Sokoloff  
The Sweet Life, Inc.  
1111 Brickell Avenue  
11<sup>th</sup> Floor  
Miami, FL 33131

Dear Reesa,

H-P Distributors is pleased to be one of your distributors. Because of the unique ingredients in your products, we have been able to get placement in the weight loss, health, sugar free and allergy sections of most stores. The customers appreciate the fact that there is no aftertaste as there is with most sugar alcohol sweeteners, and people with gluten intolerances are amazed at the texture.

Keep up the good work,

Sincerely,

Anne Horner  
President  
H-P Distributors, Inc.



**RULE 1.132 DECLARATION OF Alan Rosen**

**REGARDING COMMERCIAL SUCCESS**

I, Alan Rosen, declare as follows:

1. I am the President of Junior's Cheesecake of Brooklyn, (hereinafter Junior's), a New York based corporation located at 386 Flatbush Ave. Ext. Brooklyn, NY 11201

2. I have been the president since 2000, and have been in the baking and restaurant industry for 15 years.

3. Junior's is a renowned cheesecake manufacturing company known throughout the U.S. Junior's enjoys a reputation for high quality good tasting dessert products.

4. I had long been experimenting with different products to create a sugar-free cheesecake to fill the growing dessert needs of the diabetic and low carb. community. I had exhausted the market place for different product mixes and recipes that would provide a good-tasting cheesecake that met with my high standards. All of these attempts did not meet our high standards.

5. In 2003, one of my brokers introduced me to the mixes of The Sweet Life, Inc. and their absolutely unique and delicious sugar-free, cheesecake mix. After making a cake for the cheesecake mix, the finished cheesecakes were as good as could be with no sugar and meeting all the dietary requirements we had set forth for the product line

6. 6. Mixes for Sweetlife including Fran Gare's Decadent Desserts® and Fran Gare's Miracle Sweet® include several flavors exist including the cheesecake mix. This will be referred to hereinafter as the "mix".

7. The mix includes an all-natural blend of xylitol, whey protein and fiber, such as, psyllium, which due to its sugar-free, gluten-free combination makes it have a unique combination of benefits while maintaining taste and texture of sugar and flour based products.

8. I do not have knowledge of any other product mix, which includes Sweetlife's unique ingredient combinations. While other products mixes on the market have sugar-free and grain-free claims, the other product mixes do not provide the texture, appearance and taste that the unique mixes of Sweetlife provide.

9. I have been so impressed with the product mix due to the ingredient combination, the health benefits and the look and taste of the finished product that I approached one of my largest clients, QVC, which has been my customer for years, to sell cheesecakes made with The Sweet Life's proprietary mix. The results were amazing. In one day, I sold 6,000 cakes in 10 minutes.

10. The ingredients list, the texture (as shown on TV) and our description of the taste created an enormous amount of orders.

11. Since then, the cake has been represented on QVC with enormous popularity. Many of the previous purchasers reordered and new customers ordered the cakes made from the Sweet Life mix.

12. I have since made these cakes a part of my line, and sell them to major restaurant, hotel chains, and specialty stores across the country.

13. The Sweet Life's unique all natural, sugar and flour-free mix improved my sales so dramatically that I have inquired about becoming a stockholder in the company.

I declare that the statements made herein of my own knowledge are true, and that all statements made on information and belief are believed to be true, and further that these statements are made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 8 of the United States Code; and that such willful statements may jeopardize the validity of the application or any patent issuing thereon.

Alan Rosen

Date:

7/27/04

Alan Rosen

President, Junior's of Brooklyn, Inc.

Sworn before me this date

28/07/04

Notary Signature

GEORGIA BLAINE  
Notary Public, State of New York  
No. 01BL6056884  
Qualified in Kings County  
Commission Expires April 2, 2007

From: "Pascua, Vance" <VPascua@OaksChristian.org>  
Date: Thu, 20 May 2004 09:22:39 -0700

>Reesa ~

>

>Thank you for your phone message. Here's the message below that I sent previously to your frangare.com email. Thanks!

>

> \_\_\_\_\_

>

>I was checking with you to see what can be done, if anything, about getting a price break on ordering a large quantity of the Chocolate Brownie & Cookie Mix. We can not find it anywhere near us and it is the only baking mix my wife, Diane, seems to be able to do well with. Remember, she is Celiac and has severe intestinal/digestion malfunction.

>

>Please consider and let me know what you think.

>

>Thank you for the ways you have helped me to this point. Your product is literally a "life saver" for my wife!

>

>Blessings,

>Vance Pascua

>

>Vance Pascua

>Director of Admissions

>Oaks Christian School

>31749 La Tienda Drive Westlake Village CA 91362

>818-575-9218 (phone) 818-575-9951 (fax)

> <<http://www.oakschristian.org/>> <http://www.oakschristian.org/>

RULE 1.132 DECLARATION OF Dr. Fred Pescatore

REGARDING COMMERCIAL SUCCESS

I, Dr. Fred Pescatore, declare as follows:

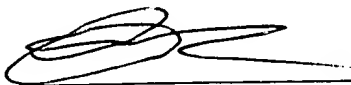
1. I am a medical doctor and have practiced general and nutritional medicine for 11 years. I was the former medical director of the Atkins Center for complementary Medicine for five years and have been practicing medicine in my own practice for the past six years and am considered the nation's leading medical authority on the controlled carbohydrate lifestyle.
2. My practice is a broad based Integrative Internal Medicine practice. I believe that proper nutrition is the basis of a healthy lifestyle. Most patients come to see me because they want to feel and look younger, healthier, better, and most of them have disorders created by high carbohydrate diets. This almost always means a comprehensive, nutritious, reduced carbohydrate weight loss program.
3. I recommend The Sweet Life desserts to my patients as I know that the desserts will satisfy their sweet cravings and not engender an insulin reaction in their bodies, I have written four books, many articles and have appeared on Network TV as a Physician Expert on diets for healthy adults and children.
4. My current book, The Hampton's Diet, a national bestseller, provides readers with wholesome, balanced and healthy diet advice and recipes. My book contains many recipes, but few desserts.
5. The dessert recipes that I included in my book had to meet with the high standards that I set out for in the book. It is very important to me that the foods people eat are wholesome and promote a healthy body and lifestyle.
6. Sweetlife's Fran Gare's Decadent Desserts® dessert mixes are recommended as a recipe in the book as these desserts provide a uniquely all natural, sugar-free, grain-free and gluten-free dessert. The dessert mixes provide natural ingredients, fiber and no sugar.

7. In recent years, medicine has discovered that at least 1/2 of all people have a sensitivity to gluten, a protein found in many grains. When ingested, gluten seriously affects the digestive process, inflaming the lining of the stomach and intestines, causing pain, and in extreme cases may cause death (as in Celiac Disease).

8. To my knowledge, all natural sugar-free and gluten-free desserts do not exist in the market place except for desserts made with The Sweet Life mixes. I eat these delicious desserts myself, just because I believe they are healthy, look and taste like high sugar and flour pastries so there is no compromise.

9. I recommend Sweetlife's mixes to my readers and to my patients.

I declare that the statements made herein of my own knowledge are true, and that all statements made on information and belief are believed to be true, and further that these statements are made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 8 of the United States Code; and that such willful statements may jeopardize the validity of the application or any patent issuing thereon.



Date: 7/20/04

Dr. F. Pescatore

Sworn before me this date 7/20/04



Notary Signature

**DINAH PYRONNEAU**  
Notary Public, State of New York  
No. 01PY8105881  
Qualified in Kings County  
Commission Expires Feb. 23, 2008

**RULE 1.132 DECLARATION OF Dr. Fran Gare**  
**REGARDING COMMERCIAL SUCCESS AND LONG-FELT NEED**

I, Dr. Fran Gare, declare as follows:

1. I am a shareholder of Sweet Life, Inc. (hereinafter Sweet Life), a Florida based corporation located at 1111 Brickell Avenue 11th Floor, Miami Florida 33131

2. I am a Naturopathic Medical doctor with a degree from Braintridge Forest School, England and The University of Bridgeport, CT. and have been involved as a health practitioner and in food technology and diets for 35 years.

3. I am an accomplished author and researcher in food technology and diets. I authored and coauthored seven books (three best sellers) about better health and diet (four with the famous Dr. Atkins) that sold over 6,000,000 copies. I was Director of Nutrition of The Atkins Center for Clinical Nutrition, Director of Natural Medicine at Miami Heart Hospital and Nutrition Expert for C.B.S. TV syndicated out of Miami, Fl (WFOR).

4. Over the years, there has been a long-standing need and nothing available, for diabetic and gluten sensitive individuals, for healthy, sugar and gluten-free (flour-less) desserts that did not cause an insulin reaction in the body when eaten. (These desserts happen to also be low carbohydrate which is a need that currently exists, and has existed for the past forty years).

5. I am the sole inventor of application serial no. 09/759,567, and I have assigned my rights to The Sweet Life, Inc. in an assignment recorded at Reel No. 011539, frame 0512.

to help their patients. Today doctors all over the country are asking patients to use my mixes. I never dreamed that there would be such a great demand for the product in the commercial market place. Before I could catch my breath, the product was on the shelves of health food stores, in supermarkets, being served in restaurants, spas and even schools. I attribute the success of the products to the special formulation that allows the sweet delicious taste of all natural Xylitol to come through. Xylitol is an all natural sugar alcohol that teaspoon-for-teaspoon is as sweet as sugar. When combined with soy or other low insulin producing fillers the end results were gummy, dense and it's sweetness was masked by the taste of the filler.

10. My discovery is the perfect balance of <sup>xylitol 72</sup> whey protein and fiber which provides a texture similar to flour-based products currently on the market. It does not, however contain flour or gluten and it allows the sugar-like sweetness of xylitol to linger on the taste buds.

11. In fact, when combined with Xylitol, the whey protein and fiber coact to provide a texture and taste that is on par or better than the sugar and flour based products. When mixed in the appropriate proportions, the xylitol, whey protein and fiber create the perfect confection eliminating the need for intake of sugar and flour-laden foods for those who (for health reasons or personal preference) prefer not to eat them. The moisture produced by baking is absorbed by the Xylitol creating the structure of the fiber and whey protein to produce a superior matrix for the baked product.

12. The mixes of The Sweet Life, Inc. rely on the correct proportions. These proportions are not easily recognized by someone skilled in that art of food technology. I confirmed this when I asked Avigdor Orr from Rutgers University Food Science Laboratory to recreate the mixes.

13. The mixes are blended in accordance with the claims of patent application, Serial No.



6. The Sweet Life, Inc. is the distributor of several product mixes which are referred to as Fran Gare's Decadent Desserts® and Fran Gare's Cheesecakes™. Several flavors exist including New York Cheesecake, Chocolate Cheesecake mixes, Almond Mix, Chocolate Mix and Cinnamon Pecan Mix. The mixes are very versatile since they do not contain any flour, <sup>or sugar</sup> they produce a variety of products including (but not limited to) cakes, cookies, muffins, mousses, ice cream, puddings, buns and cupcakes. These mixes will be referred to hereinafter as "mixes". The Sweet Life, Inc. was formed to develop and distribute the mixes.

7. I developed the mixes as an answer to my over 6000 patients requests to produce desserts that they could guiltlessly enjoy. Desserts that met with the long-felt need of sweet treats that provided without compromise, the taste and texture of regular desserts without the sugar or gluten normally needed to achieve these results.

8. As early as 1972, I had been working on developing sugar and grain-free desserts using soy and artificial sweeteners which was all that were available to me. It was my original formulations using soy and artificial sweeteners that I published in Dr. Atkins Diet Revolution in 1972 and Dr. Atkins Diet cookbook two year later, that were the basis for the plethora of artificially sweetened soy products that are on the market today. Therefore, sugar-free products that used soy instead of flour have been used, but typically required a man-made sugar substitute. Over the years many companies have asked me to develop products like these for them. I knew that they were not healthy. I told my patients, family and friends that if I could find a way to develop a product that could possibly wipe out diabetes and childhood obesity, and make people healthier, that I would retire from medicine and do it, but never believed such a product could exist. Then suddenly it all came together.

9. When I developed the original mix, I took it to other doctors feeling that they could use it

09/759,567.

14. Given the strong need for sweet, healthy foods that do not raise insulin levels in diabetics, hypoglycemics and cause hyperactive children to bounce off walls, and the need for healthy, truly low carbohydrate desserts that do not affect the dieters pancreas causing it to secrete insulin, and the size of the diet market (low carb or not-- sugar has to be eliminated to loose weight), one of ordinary skill in the art would not have been able to develop the mixes of the present application, though many have tried. However, it is not easily discernible to one skilled in the art to develop the recipe for the mixes of the present application.

14. All of the products, as referenced above, have an ingredients list clearly visible on the label. Xylitol, whey protein and fiber (psyllium) are all listed and clearly visible. These ingredients follow the elements and proportions presently recited in the claims of the above-references patent application.

15. The combination of ingredients coact to bring about a superior finished product. The finished product is a baked product or food having all of the features of the present claims and provides a taste of a flour and sugar containing dessert without gluten and sugar.

16. The baked products and mixes are distinguished from other available products currently on the market. The superior quality of the finished product as a result of the blending and proportions set forth in the claims is the reason for the success of the product and has satisfied the long-felt need for a sugarless and gluten-free desserts.

17. As a naturopathic medical doctor, who has worked with diabetics and other sugar disorders for 35 years, I recognized a long-felt need for a sugarless and gluten-free product for the

many (30,000,000 diabetics, 35-50% of people with gluten intolerances and more obese children then we wish to count).

18. Many individuals who suffer from these diseases or intolerances do not have the opportunity to eat desserts. By providing a sugar-free, flour-less dessert, these individuals can partake in desserts that are healthy and all-natural.

I declare that the statements made herein of my own knowledge are true, and that all statements made on information and belief are believed to be true, and further that these statements are made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 8 of the United States Code; and that such willful statements may jeopardize the validity of the application or any patent issuing thereon.

Date: D. Fran Gare

Dr. Fran Gare

Sworn before me this date 9/10/04

Charles Flender

Notary Signature

**Charles Flender**  
Notary Public State of New York  
No. 01FL6092640  
Qualified in Suffolk County  
Commission Exp. 05/27/2007

**THE WESTIN  
CENTURY PLAZA  
HOTEL & SPA**

Los Angeles

2025 Ave. of the Stars  
Century City, CA. 90067  
(310) 551-3386

June 3, 2004

Reesa Sokoloff M.S, R.D  
The Sweet Life, Inc.  
1111 Brickell Ave.  
11<sup>th</sup> Floor  
Miami, FL 33131

Dear Reesa,

Over a year ago, I was given the directive from Starwood corporate to research sugar free, low carb desserts for our menus. Based on my past experience with such desserts, I was a bit hesitant to proceed with a positive outlook.

After countless samples and tastings, I never came across a product I really cared for. Actually, I could not believe on how terrible some of these products tasted. I was beginning to think that I'm the wrong person to ask for this. As a pastry chef, I've always resisted to use sugar substitutes. My suggestions have always been to just eat half the amount.

Recently, I had the opportunity to taste a cheesecake made with The Sweet Life's cheesecake mix. I have to honestly tell you, my first reaction was that of complete surprise. I found myself taking bite after bite, to reassure my taste buds. If I were not first told that this was a sugar free, low - carb dessert, I would have never known.

As mentioned, sugar free low carb desserts have always been a challenge for me. I now really look forward to working with your products to create some of these desserts for our menus. It's good to know that I can offer our guests a product they very much desire, as well as satisfying my need for quality and taste.

Sincerely,



Thomas Henzi

**RULE 1.132 DECLARATION OF Dr. Fran Gare**

I, Dr. Fran Gare, declare as follows:

1. I am a shareholder of Sweet Life, Inc. (hereinafter Sweet Life), a Florida based corporation located at 1111 Brickell Avenue 11th Floor, Miami Florida 33131. I am the sole inventor of application serial no. 09/759,567, and I have assigned my rights to The Sweet Life, Inc. in an assignment recorded at Reel No. 011539, frame 0512.

2. I am a Naturopathic Medical doctor with a degree from Braintridge Forest School, England and The University of Bridgeport, CT. and have been involved as a health practitioner and in food technology and diets for 35 years.

3. The Sweet Life, Inc. is the distributor of several product mixes which are referred to as Fran Gare's Decadent Desserts® and Fran Gare's Cheesecakes™. Several mix flavors exist including New York Cheesecake, Chocolate Cheesecake, Almond Mix, Chocolate Mix and Cinnamon Pecan Mix. The mixes are very versatile. The mixes do not contain any grain, flour, or sugar, but can produce a variety of products including (but not limited to) cakes, cookies, muffins, mousses, ice cream, puddings, buns and cupcakes. These mixes will be referred to hereinafter as "mixes". The Sweet Life, Inc. was formed to develop and distribute the mixes.

4. At a point and time in 2001, I hired a food technologist, Avigdor Orr, of Rutgers University in New Brunswick, NJ in the Food Technology Department, to attempt to reverse engineer several of the mixes from an ingredients list, which included Xylitol, whey protein and fiber. Mr. Orr's task was to analyze several of The Sweet Life product mixes, in order to reproduce the mixture for quality control without knowledge of the correct proportions.

5. I was informed by the Dean of the Food Technology School at Rutgers University that Mr. Orr held an M.S. in Food Technology and had been involved in many analyses including reverse engineering of food mixes.

6. After significant expense and many attempts at duplicating the mixture, Mr. Orr could not fully or satisfactorily duplicate the look and taste of products developed using the original mixes.

7. The mixes are, in my opinion, very difficult to duplicate and could not be duplicated by those skilled in the art without undue experimentation, and even then, while Xylitol, whey protein and fiber (psyllium) are all listed and clearly visible on the packages, the process and proportions by which the mixes are blended and prepared would not be obvious to practitioners.

I declare that the statements made herein of my own knowledge are true, and that all statements made on information and belief are believed to be true, and further that these statements are made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 8 of the United States Code; and that such willful statements may jeopardize the validity of the application or any patent issuing thereon.

Date:

Dr. Fran Gare

Dr. Fran Gare

Sworn before me this date 16 Nov 2004

Charles Flender

Notary Signature

Charles Flender  
Notary Public State of New York  
No. 01FL6092640  
Qualified in Suffolk County  
Commission Exp. 05/27/2007

10. **RELATED PROCEEDINGS APPENDIX**

None



**11. CERTIFICATE OF SERVICE**

Not applicable.

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